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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

RONALD MANNING, Commissioner of the
Department of Human Resources of
the State of Connecticut,

Petitioner

v.

ELINOR NELSON, DOUGLAS SPELLS,
DENNIS EATON, PHILLIP CORSO,
Individually and on behalf of
those similarly situated.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

1. Whether the Internal Revenue Service tax intercept progam, which provides for the interception of income tax refunds of those persons owing unpaid child support assigned to a state, includes earned income credits authorized under the United States Internal Revenue Code.

2. Whether the decision of the United States Court of Appeals for the Second Circuit, upholding the ruling of the United States District Court of Connecticut that persons who claimed earned income credits as part of their refunds of tax overpayments and whose tax refunds were intercepted for past-due child support assigned to the State of Connecticut, were entitled to reimbursement of that portion of their tax refund attributable to earned income credits, violates the Eleventh Amendment to the United States Constitution, as such decision will result in the recovery of damages from the State of Connecticut.

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*The Second Circuit also decided the companion appeal, Docket No. 83-6240, in the same decision, *Nelson, et al. v. Donald Regan, Secretary of the United States Department of Treasury, and Margaret M. Heckler, Secretary of the United States Department of Health and Human Services.* The federal defendants have not petitioned for a writ of certiorari.

TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of Case 2

Reasons For Granting Writ 10

I. The term "overpayment" includes earned income credits for the purpose of the tax intercept program wherein income tax refunds are offset against past-due child support and that therefore such earned income credits are subject to offset contrary to the ruling of the Second Circuit Court of Appeals..... 10

II. The decision of the United States Court of Appeals for the Second Circuit that persons who claimed earned income credits as part of their tax overpayment and whose tax refunds were intercepted for past-due child support assigned to the State of Connecticut were entitled to reimbursement of that portion of their tax refund attributable to earned income credits, violates the Eleventh Amendment to the United States Constitution as such decision will result in the recovery of damages from the state 14

Conclusion 17

Appendix A: *Nelson v. Regan,* Defendant Mannings petition for rehearing denied, Filed May 31, 1984 ..... 1a

Page

Appendix B: *Nelson v. Regan*, Decision of the United States Court of Appeals, Second Circuit, decided March 31, 1984, reported at 731 F.2d 105 (2nd Cir. 1984) 3a

Appendix C: *Nelson v. Regan*, Ruling on Remedy and Final order, United States District Court, District of Connecticut decided April 22, 1983, unreported 17a

Appendix D: *Nelson v. Regan*, Ruling on Federal Defendant's motion to dismiss, plaintiff's motion for class certification and cross motions for summary judgment, United States District Court, District of Connecticut, decided January 14, 1983, reported at 560 F.Supp. 1101 (D. Conn. 1983) 32a

Appendix E: *Sorenson v. Secretary of Treasury of the United States*, 557 F. Supp. 1051 (N.D. Wash. 1982) 50a

Appendix F: Affidavit of Anthony DiNallo, filed in U.S. District Court Conn. in *Nelson v. Regan*, dated September 13, 1983 ..... 68a

TABLE OF AUTHORITIES

Page

Cases:

Consumer Product Safety Commission v. GTE Sylvania Inc., 447 U.S. 102 (1980) 11

Coughlin v. Regan, 10 Fam. L.R. 1371 (U.S.D.C. Maine 4/11/84) 13

Edelman v. Jordan, 415 U.S. 651 (1974)..... 14, 15

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 15

Ford Motor Co. v. Department of Treasury, 323 U.S. 459 (1945)..... 14, 15

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)..... 11

Hans v. Louisiana, 134 U.S. 1 (1890) 14

Jagnandan v. Giles, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977)..... 15

Milliken v. Bradley, 433 U.S. 267 (1977) 9, 16

Nelson v. Regan, 731 F.2d 105 (2d Cir. 1984).. 1, 8, 10, 11

Nelson v. Regan, 560 F. Supp. 1101 (D. Conn. 1983) 1, 6, 10, 11

Quern v. Jordan, 440 U.S. 332 (1979)..... 9, 15, 16

Rucker v. Secretary of the Treasury of the United States, 555 F. Supp. 1051 (D. Colo. 1983) 12, 14

Page

Sorenson v. Secretary of Treasury of the United States, 557 F. Supp. 729 (N.D. Wsh. 1982) 9, 12, 14

State of Alabama v. Pugh, 438 U.S. 781 (1978)..... 14

Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937)..... 14, 15

Constitutional Provisions:

United States Constitution, Amendment V 2

United States Constitution, Amendment XI ... 4, 9, 14, 16

United States Constitution, Amendment XIV 4, 15

Statutes:

Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 §2331 95 Stat. 357 (1981) 3, 10, 13

26 U.S.C. §43 ..... 2, 3, 10, 13

26 U.S.C. §6401 ..... 2, 8, 10, 11, 12

26 U.S.C. §6402 ..... 2, 8, 10, 11

26 U.S.C. §7421(a) 6, 7

26 U.S.C. §7422(a) 5

28 U.S.C. §1254 (1)..... 2

28 U.S.C. §1331 3

Page

28 U.S.C. §1343 3

28 U.S.C. §2201 6

42 U.S.C. §602(a) 2

42 U.S.C. §603(a)(3) 15

42 U.S.C. §644 ..... 2, 3, 8, 11, 15

42 U.S.C. §1983 ..... 4, 15

Federal Rules:

Fed. R. App. P. 41 9

Miscellaneous:

S. Rep. No. 94-36, 94 Cong. 1st Sess. II (1975) 9

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Appendix B, pp. 3a-16a infra) is reported at 731 F.2nd 105. The ruling or remedy and final order of April 22, 1983, is unreported (Appendix C, pp. 17a-31a infra). The opinion of the United States District Court of Connecticut (Appendix D, pp. 32a-49a infra) is reported at 560 F. Supp. 1101 (D. Conn. 1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit (Appendix B, p. 2a) was entered on March 13, 1984. A timely petition for rehearing was denied on May 31, 1984 (Appendix A, p. 1a). The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

26 U.S.C. §43 appears in its entirety in footnote 3 of this petition; 26 U.S.C. §6401 appears in its entirety in footnote 13 of the ruling of the United States District Court of Jan. 14, 1983 (see Appendix D); 26 U.S.C. §6402 appears in its entirety in footnote 1 of the opinion of the Court of Appeals for the Second Circuit; and 42 U.S.C. §644 appears in its entirety in footnote 1 of the opinion of the Court of Appeals for the Second Circuit (see Appendix B).

STATEMENT

The federal "tax intercept" program provides for the interception of refunds resulting from overpayment of taxes to be applied to child-support arrearages in cases where the child-support payments have been assigned to the state, pursuant to 42 U.S.C. §602(a).[1]

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[1]The pertinent provisions of 42 U.S.C. §602(a) appear in footnote 1 of the opinion of the United States Court of Appeals, Second Circuit (see Appendix B, p. 5a).

Interception of such tax refunds due individuals owing child-support obligations to a state was authorized by the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 §2331.[2]

This suit originated in the United States District Court, District of Connecticut, as a class action seeking a declaratory judgment that the statutes and regulations as implemented were unconstitutional and requesting the court to require the defendants to protect the due-process rights of the plaintiffs by providing for notice and hearings prior to interception of tax refunds for a claimed child-support arrearage. The plaintiffs also requested that the District Court find that earned income credits available to certain low-income individuals are not subject to the tax intercept program.[3] Jurisdiction was conferred on the District court by 28 U.S.C. §1331, 28 U.S.C. §1343 (3) and (4), since this is an action arising under the

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[2]The text of §464 of the Social Security Act, 42 U.S.C. §664 (Supp. V, 1981), a part of §2331 of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, 95 Stat. 357 (1981), appears in footnote 1 of the opinion of the United States Court of Appeals, Second Circuit (see Appendix B, pp. 5a-7a).

[3]26 U.S.C. §43 provides:

"(a) Allowance of credit.—In the case of an eligible individual, there is allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 10 percent of so much of the earned income for the taxable year as does not exceed $5,000.

(b) Limitation.—The amount of the credit allowable to a taxpayer under subsection (1) for any taxable year shall not exceed the excess (if any) of—

(1) $500, over

(2) 12.5 percent of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds $6,000.

(c) Definitions.—For purposes of this section—

(1) Eligible individual.—

(A) In general.—The term 'eligible individual' means an individual who, for the taxable year—

(i) is married (within the meaning of §143) and is

Constitution and laws of the United States. The plaintiffs' cause of action arises under 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the United States Constitution.

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entitled to a deduction under §151 for a child (within the meaning of §151(e)(3)),

(ii) is a surviving spouse (as determined under §2(a)), or

(iii) is a head of a household (as determined under subsection (b) of §2 without regard to subparagraphs (A)(ii) and (B) of paragraph (1) of such subsection).

(B) Child must reside with taxpayer in the United States.—An individual shall be treated as satisfying clause (i) of subparagraph (A) only if the child has the same principal place of abode as the individual and such abode is in the United States. An individual shall be treated as satisfying clause (ii) or (iii) of subparagraph (A) only if the household in question is in the United States.

(C) Individual who claims benefits of §911 or 931 not eligible individual.—The term 'eligible individual' does not include an individual who, for the taxable year, claims the benefits of—

(i) §911 (relating to citizens or residents of the United States living abroad),

(ii) §931 (relating to income from sources within possessions of the United States).

(2) Earned income.—

(A) The term 'earned income' means—

(i) wages, salaried, tips, and other employee compensation, plus

(ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of §1402(a)).

(B) For purposes of subparagraph (A)—

(i) the earned income of an individual shall be computed without regard to any community property laws,

(ii) no amount received as a pension or annuity shall be taken into account, and

(iii) no amount to which §871(a) applies (relating to

Both the federal and state defendants raised jurisdictional arguments before the District Court claiming: (1) that the action was barred by the failure of the plaintiffs to comply with the jurisdictional requirements of §7422(a) of the Internal Revenue Code of 1954 which provides that no suit shall be maintained for the recovery of a tax paid until a claim for refund has been filed with the Internal Revenue Service; (2) that the Anti-Injunction Act,

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income of nonresident alien individuals not connected with United States business) shall be taken into account.

(d) Married individuals.—In the case of an individual who is married within the meaning of §143), this section shall apply only if a joint return is filed for the taxable year under §6013.

(e) Taxable year must be full taxable year.—Except in the case of a taxable year closed by reason of the death of the taxpayer, no credit shall be allowable under this section in the case of a taxable year covering a period of less than 12 months.

(f) Amount of credit to be determined under tables.—

(1) In general.—The amount of the credit allowed by this section shall be determined under tables prescribed by the Secretary.

(2) Requirements for tables.—The tables prescribed under paragraph (1) shall reflect the provisions of subsections (a) and (b) and shall have income brackets of not greater than $50 each—

(A) for earned income between $0 and $10,000, and

(B) for adjusted gross income between $6,000 and $10,000.

(g) Coordination with advance payments of earned income credit.—

(1) Recapture of excess advance payments.—If any payment is made to the individual by an employer under §3507 during any calendar year, then the tax imposed by this chapter for the individual's last taxable year beginning in such calendar year shall be increased by the aggregate amount of such payments.

(2) Reconciliation of payments advanced and credit allowed.—Any increase in tax under paragraph (1) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit (other than the credit allowed by subsection (a)) allowable under this subpart."

§7421(a) barred the action; and (3) that 28 U.S.C. §2201 (1976), the "Declaratory Judgment Act," precludes declaratory relief "with respect to federal taxes."

The defendants contested in the District Court some of the general claims made by the plaintiffs that their right under the due-process clause of the Fourteenth Amendment to the United States Constitution had been violated by the operation of the tax intercept program.

The state defendant raised the Eleventh Amendment to the United States Constitution as a defense to any claim made by the plaintiffs to retroactive recovery.

Lastly, the plaintiffs claimed in the District Court that the statutes implementing the tax intercept program did not authorize interception of that portion of a refund for overpayment of taxes attributable to an earned income credit.

On January 14, 1983, the District Court, Ellen B. Burns, Judge, in a "Ruling on Federal Defendant's Motion to Dismiss, Plaintiffs' Motion For Class Certification and Cross Motions For Summary Judgment," reported as *Nelson v. Regan*, 560 F.Supp. 1011 (D.Conn.1983) (Appendix D), rejected the defendants' jurisdictional arguments. The Court certified as a class all those persons "who have had or will have their tax refunds intercepted and paid over to the State of Connecticut" and rejected the state's claim of immunity under the Eleventh Amendment. *Id.* at 1105. (Appendix D, p. 36a) The Court recognized due-process requirements for notice and hearings for all those persons whose tax refunds were subject to interception. The District Court also ruled that earned income credits due individuals as part of their refund from the Internal Revenue Service were not subject to the intercept program. *Id.* at 1109-1111, (Appendix D, pp. 45a-48a).

On April 22, 1983, the District Court issued its Ruling on Remedy and Final Order, which is unreported (Appendix C). In the April 22, 1983 ruling, the District Court rejected the federal defendant's motion for reconsideration of the Court's prior ruling and set forth specific requirements for pre-offset notice and hearings for persons subject to the intercept program. The Court, in its April 22nd Final Order, re-affirmed its ruling that earned income credits were not subject to interception for past-due support, but stayed the effect of that ruling until after appeal to the United States Court of Appeals for the Second Circuit (Appendix C, pp. 19a-20a). The Court ordered the state to send pre-offset notices to all persons who may be subject to the tax offset program and provisions for administrative hearings. The Court also ordered notifications to be sent to all persons whose 1981 tax refunds were intercepted informing them of their right to an administrative hearing by the state (Appendix C, p. 29a).

The April 22nd Final Order required the Internal Revenue Service to refund a non-obligated spouse's portion of an intercepted tax refund in the case of a joint return and to refund earned income credits to eligible individuals if the Court's ruling is upheld on appeal (Appendix C, p. 29a). The Court stated that there was no immediate Eleventh Amendment issue because if the Court's ruling on earned income credits is upheld, "only the Internal Revenue Service and not the state will be responsible for making refunds to individuals" (Appendix C, p. 24a-25a).

An appeal was taken by both federal defendants and the state defendants to the United States Court of Appeals for the Second Circuit. The federal defendants appealed the District Court's ruling on the jurisdictional grounds argued before the District Court, except for the argument that the action was barred by the Anti-Injunction Act, §7421(a) of the Internal Revenue Code of 1954, which was not renewed on appeal. The federal defendants appealed the District Court's ruling certifying as class plaintiffs persons subject, or who may be subject, to the intercept program. The

federal defendants also appealed the Court's ruling on earned income credits.

The state defendant appealed the District Court's ruling that the portion of a refund for overpayment from the Internal Revenue Service attributable to earned income credits were not subject to the intercept program, appealed the District court's holding that its decision did not amount to a retroactive recovery prohibited by the Eleventh Amendment, and renewed the jurisdictional argument raised in the District Court.

On March 13, 1984, in a decision reported as *Nelson v. Regan*, 731 F.2d 105 (2dCir.1984), (Appendix B), the United States Court of Appeals, Second Circuit, affirmed the District Court's decision in all the issues raised on appeal.

The Court of Appeals, in its ruling on earned income credits, agreed with the District Court that 26 U.S.C. §6402(c), which provides for offset of past-due child support against overpayment of taxes, limited the offset to actual taxes that were overpaid. The Court based its reasoning on the language of §6402(c) which authorized the offset against "the amount of any overpayment to be refunded to the person making the overpayment." The Court also noted the less inclusive language of 42 U.S.C. §664 which provides that the Secretary of Treasury "shall determine whether any amount as refunds of federal taxes paid" are payable to individuals who owe past-due child support assigned to a state. The Court, while conceding that the question was a "close one," reached its conclusion despite the language of 26 U.S.C. §6401(b)[1] which provides that earned income credits (and other credits) exceeding the tax imposed shall be considered an "overpayment" and 26 U.S.C. §6401(c) which provides that where there is no tax liability, the amount paid as a tax

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[1]The pertinent text of 26 U.S.C. §6401 appears in footnote 4 of the opinion of the Court of Appeals (Appendix B, p. 13a) and the full text in footnote 13 of the ruling of the District Court of Jan. 14, 1983 (Appendix D, p. 47a).

"shall not be considered not to constitute an overpayment" solely by reason of the fact that there was no tax liability in respect of which the tax was paid. 731 F.2d at 111. The Court also noted the case of *Sorenson v. Secretary of Treasury*, 557 F.Supp. 729, 734 (N.D. Wash. 1982) (appeal docketed, ND 83-3694) (9th Cir. argued Feb. 10, 1984), (Appendix E), reaching the conclusion that earned income credits are subject to interception.

The Court of Appeals supported its position that earned income credits were not subject to the intercept program by stating that the purpose of the credit was to provide "work-bonus" for families who paid little or no income tax, citing S. Rep. No. 94-36, 94 Cong., 1st Sess.II. *reprinted in* 1975 U.S. Code Cong. & Ad News 54, 63-64. 731 F.2d at 110, 111.

The Court of Appeals also upheld the District Court in its ruling on the state's Eleventh Amendment claim of immunity. The Court of Appeals, as did the District Court, took the position that whether a class member receives retroactive benefits rests entirely with the state. The Court, citing *Quern v. Jordan*, 440 U.S. 332, 347 (1979), and *Milliken v. Bradley*, 433 U.S. 267 (1977), (Appendix B, pp. 11a-12a), noted that the fact that the state will incur adminstrative expenses does not violate the Eleventh Amendment.

On May 31, 1984, the Court of Appeals denied the state defendant's petition for rehearing and suggestion that the case be heard in banc, (Appendix A). On June 14, 1984, the Court of Appeals pursuant to Rule 41 of the Federal Rules of Appellate Procedure, stayed its mandate pending application to the United States Supreme Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I

THE TERM "OVERPAYMENT" INCLUDES EARNED INCOME CREDITS FOR THE PURPOSE OF THE TAX INTERCEPT PROGRAM WHEREIN INCOME TAX REFUNDS ARE OFFSET AGAINST PAST-DUE CHILD SUPPORT AND THAT THEREFORE SUCH EARNED INCOME CREDITS ARE SUBJECT TO OFFSET CONTRARY TO THE RULING OF THE SECOND CIRCUIT COURT OF APPEALS.

Earned income credits are available in the case of eligible individuals, as a credit against income taxes based on a percentage of the taxpayer's income under §43(a) of the Internal Revenue Code. The maximum credit allowable is $500, and the credit is reduced proportionately to the extent the taxpayer's income exceeds $6,000 but is less than $10,000, 26 U.S.C. §43(b).

Amounts to be paid an individual as an earned income credit are paid as a refund of taxes and are considered an "overpayment." 26 U.S.C. §6401. See text in footnote 4, *Nelson v. Regan*, 731 F.2d 105, 111 (Appendix B, p. 13a) and footnote 13, *Nelson v. Regan*, 731 Fed.Sup. 1101 (D. Conn. 1983) (Appendix D, p. 47a).

Congress provided for the interception of all "overpayments" to satisfy delinquent support obligations assigned to the state by the adoption of the Omnibus Budget Reconciliation Act of 1981 which added 26 U.S.C. §6402(c) since §6402(c) refers to the interception of the "overpayment" for delinquent support.

The District Court's ruling of January 14, 1983 claimed that there was an ambiguity involving the use of the word "overpayment" in 26 U.S.C. §6402. Judge Burns interpreted the phrase "overpayment to be refunded to the person making the overpayment" as stated in §6402(c) as limiting the definition of overpayment. *Nelson v.*

Regan, 560 Fed. Supp. 1101 at 1110 (Appendix D, p. 48a). Apparently the District Court interprets the phrase as meaning that if an overpayment is not "made", i.e. actually paid to the Internal Revenue Service, the Internal Revenue Service may not offset against it. The Second Circuit by implication adopted the reasoning of the District Court in *Nelson v. Regan*, supra. The petitioner maintains that the definition of "overpayment" in 26 U.S.C. §6401 precludes the interpretation that the overpayment must be "made." If Congress intended to change the definition of "overpayment" for the purpose of the intercept program to meaning actually paid to the Internal Revenue Service, they would have done it directly, rather than as the District Court and the Second Circuit appear to suggest. If 26 U.S.C. §6402(c) does not limit interception of an overpayment to taxes actually paid, then 42 U.S.C. §664(a) does not support the District Court and the Second Circuit holding. 26 U.S.C. §664(a), §464(a) of the Social Security Act is a parallel provision to §6402(c). There is nothing in its legislative history which indicates that in using the term "refund of taxes paid" Congress intended to cut back in the mandate to Internal Revenue Service in §6402(c) to offset the amount of any *overpayment* against past-due support. An excess earned income credit is a refundable overpayment of tax under the Internal Revenue Code. There is no basis for excluding amounts owed to the taxpayers as earned income credits from the support offset program.

When the will of Congress has been expressed in reasonably plain terms, "that language must be regarded as conclusive" *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982) citing *Consumer Product Safety Commission v. GTE Sylvania Inc.*, 447 U.S. 102, 108 (1980). In the instant case, the term "overpayment" has been defined by Congress as including earned income credits (26 U.S.C. §6401(b)) and Congress has authorized such "overpayment" to be offset against past-due support (26 U.S.C. §6402(c)).

The Second Circuit Court of Appeals in *Nelson v. Regan*, supra, in limiting the definition of "overpayment" concluded that these "overpayments" were not subject to the intercept program. The

Court justified its ruling by adopting the Congressional purpose of providing an incentive for low-income people to work rather than collect federal assistance. Both the Court's holding and reasoning are clearly erroneous. This holding does not coincide with the plain meaning established by Congress. The language of the statutes clearly indicates that earned income credits are subject to the tax intercept program. Likewise, the Court failed to recognize the fact that other Congressional purposes may take priority over another purpose.

In *Sorenson v. Secretary of Treasury of the United States*, 557 F.Supp. 729 (W.D. Wash. 1982), appeal docketed No. 83-3694, 9th Circuit, argued Feb. 10, 1984, the Court rejected the plaintiff's argument that earned income credits fall outside the statutes and are not subject to intercept. In its discussion of the issue, the Court described "overpayment" as a term with a specific interpretation as explained in 26 U.S.C. §6401(b). Using the clear intent of congress, the Court concluded that ". . . earned income credits are within the purview of the statutes and are subject to retention and transfer."

The *Sorenson* Court also addressed the issue of Congressional intent. The Court concluded that Congress would consider the payment of past-due child support as more important than the protection of earned income credits. Therefore, it is proper for such income credits to be subject to the intercept program. *Id.* at 734. The *Sorenson* Court stated:

"It is perfectly consistent that Congress would consider the payment of past-due child support more important than the protection of earned income credit."

More recently the District Court in Colorado reached a similar decision. In *Rucker v. Secretary of the Treasury of the United States*, 555 F.Supp. 1051 (D. Colo. 1983), appeal pending 10th Circuit, the Court cited the *Sorenson* case with approval. The Court concluded

that "it is consistent with public policy that past-due child support payments take priority before earned income credits, and that they are intercepted fairly, on a proportionate basis, in order to achieve that goal." Id. at 1053.

A similar decision was reached by the District Court of Maine, where the Court ruled that earned income credits are properly subject to interception. *Coughlin v. Regan*, 10 Fam. L.R. 1371 (U.S.D.C. Maine, 4/11/84).

The petitioner maintains that the Court in *Sorenson* reached the correct statutory construction in holding that earned income credits were subject to the intercept program. If a person claims to be supporting a dependant, which is a necessary prerequisite to obtaining an earned income credit, 26 U.S.C. §43(c), it is only just that the portion of his tax refund attributable to earned income credit be offset against the arrearage due for support of a dependent the taxpayer is not supporting, together with the rest of his refund for an "overpayment." Petitioner believes it was the Congressional intent that earned income credits would be subject to interception for past-due support along with the rest of the tax refund; this intent is expressed by the language of §6402(c) of the Internal Revenue Code adopted in the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 357, 861, which authorizes offset of overdue child support obligations assigned to the state against "the amount of any overpayment to be refunded," Congress having previously defined an "overpayment" as including earned income credits in §6401(b) of the Internal Revenue Code.

If the Ninth Circuit Court of Appeals upholds the District Court's ruling on earned income credits in the *Sorenson* case, or the Tenth Circuit Court of Appeals upholds the District Court in *Rucker* in their rulings on earned income credits, there will exist a conflict between the Circuits on the question whether the statutes involved subject earned income credits to interception for past-due child support by the Internal Revenue Service. However, regardless of

the outcome in *Sorenson* or *Rucker*, the decision of the Court of Appeals for the Second Circuit regarding earned income credits and the program for interception of tax refunds for past-due child support involves an important question of federal law affecting all fifty of the states which should be resolved by this Court so that the tax-intercept program will be administered uniformally throughout the United States.

II

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT THAT PERSONS WHO CLAIMED EARNED INCOME CREDITS AS PART OF THEIR TAX OVERPAYMENT AND WHOSE TAX REFUNDS WERE INTERCEPTED FOR PAST-DUE CHILD SUPPORT ASSIGNED TO THE STATE OF CONNECTICUT WERE ENTITLED TO REIMBURSEMENT OF THAT PORTION OF THEIR TAX REFUND ATTRIBUTABLE TO EARNED INCOME CREDITS, VIOLATES THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS SUCH DECISION WILL RESULT IN THE RECOVERY OF DAMAGES FROM THE STATE.

Any suit for damages against a sovereign state or state agency is barred by the Eleventh Amendment unless the state consents to the suit or a waiver of the state's immunity can be found. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937). See also *State of Alabama v. Pugh*, 438 U.S. 781 (1978). In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court interpreted this provision to apply to suits against a state by an instate citizen even though the language of the Eleventh Amendment prohibits only suits against a state by citizens of another state.

In a long line of cases, the Supreme Court has enunciated the rule that any suit against a sovereign state or state agency is barred by the

Eleventh Amendment unless the state consents to the suit or a waiver of the state's immunity can be found. *Edelman v. Jordan*, 415 U.S. 651 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945); *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).

While Congress, acting under the Fourteenth Amendment, has the power to waive the state's immunity to suit, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), no such waiver is evidenced in any Congressional enactment under the Social Security Act, *Edelman v. Jordan*, supra. Moreover, a state is not a "person" for purposes of 42 U.S.C. §1983 such that waiver may be inferred under the statute. *Quern v. Jordan*, 440 U.S. 332 (1979). While the Fourteenth Amendment itself imposes certain limitations upon the several states, that provision standing alone, absent Congressional action, is not a limitation upon the jurisdictional bar of the Eleventh Amendment. *Jagnandan v. Giles*, 538 F.2d 1166 (5th Cir. 1976), *cert. denied*, 432 U.S. 910 (1977).

In the present case, Connecticut has not consented to the suit, and there is no waiver of the state's immunity.

The District Court stated that it would be the Internal Revenue Service, not the state, which would be making refunds for the earned income credits previously paid to the state. Connecticut, though, is participating in a joint federal-state program wherein the federal government contributes, pursuant to 42 U.S.C. §603(a)(3), an amount equal to the sum expended by the state in its Aid to Families With Dependent Children program. Money is withheld from refunds intercepted by the Secretary of Treasury and paid to the state under 42 U.S.C. §664(a). There are numerous routes that the federal government can pursue to enforce obligations it may construe as owed to it by a state participating in the Aid to Families With Dependent Children program, including the tax intercept program. If the Internal Revenue Service makes refunds to those persons whose tax refunds were intercepted for past-due child

support, the Internal Revenue Service would easily obtain reimbursement; the Internal Revenue Service would simply debit the amount due the Internal Revenue Service from moneys to be received by the state in future years under the tax intercept program. Although the District Court stated that the Internal Revenue Service, not the state, would be making the refunds, the Court of Appeals, like the District court, refused to distinguish between the relatively minor cost of administrative hearings which may not violate this Court's interpretation of the Eleventh Amendment under the doctrine enunciated in *Quern v. Jordan, supra* at 348, and *Milliken v. Bradley,* 443 U.S. 267 (1977) and the potential exposure to much larger costs resulting from refund of earned income credits.

The amount of tax overpayments attributable to earned income credits cannot be estimated from any material that was available at the time of the proceedings in the District Court. However, in the record, and in the joint appendix filed with the Court of Appeals, is evidence that for the taxable year 1981, the state certified 20,280 names of individuals delinquent in child support to the Internal Revenue Service, and $6,157,060.40 was intercepted for past-due child support assigned to the State of Connecticut, of which $508,842.85 was refunded because persons had paid their child-support arrearages or were certified in error.[5]

The Court of Appeals, therefore, erroneously upheld the District Court's ruling that the Eleventh Amendment is not a jurisdictional bar to the retroactive reimbursement of earned income credits to persons whose tax refunds were previously offset against past-due support assigned to the state.

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[5]See affidavit of Anthony DiNallo, Chief, Child Support Unit, Department of Human Resources, State of Connecticut, dated September 13, 1982, filed in the District Court in support of Defendant Manning's Motion for Summary Judgment, which was contained in the joint appendix filed in the Second Circuit in this case (Appendix F, pp. 69a, 71a).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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